

## JONES DAY

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September 8, 2023

CM/ECF

Hon. Judith C. McCarthy  
United States Magistrate Judge  
300 Quarropas Street, Room 421  
White Plains, NY 10601-4150

Re: *Hayden v. International Business Machines Corp., et al.*, No. 7:21-cv-02485-VLB-JCM

Dear Judge McCarthy:

Defendants write in response to Plaintiff's September 5 letter (Dkt. 156) (which was filed without a meet and confer) suggesting he will again ask to extend fact discovery. Any such request should be denied. Plaintiff's alleged surprise is unfounded and any prejudice is of his own making. Discovery should conclude on October 6. Plaintiff met and conferred with Defendants today.

Defendants' supplemental initial disclosures ("IDs") are not new information. Seventeen of the 23 individuals named were previously-searched email custodians, named in Plaintiff's own IDs, and/or named in Plaintiff's discovery requests. Ex. A. The remaining six follow Plaintiff's June and August updated interrogatory answers (nearly a year after the Court's order). Regardless, Plaintiff is free to depose any of these individuals by the discovery deadline, so long as he does not exceed the Federal Rules' limit of ten depositions. Plaintiff always indicated ten was sufficient – noticing nine individuals and a 30(b)(6) in May/June 2022, and revising that list of ten on August 17, 2023 (despite identifying 23 current or former IBM employees in his own IDs). Exs. B-D. Plaintiff, who yesterday took his first deposition in the case, made no showing that the testimony sought is critical or would not be duplicative. *See Sec. & Exch. Comm'n v. Rayat*, No. 21-CV-4777

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(LJL), 2023 WL 5276544, at \*1 (S.D.N.Y. Aug. 16, 2023). And, at this late date, any more than ten is overly burdensome, unnecessary, and untimely. *Id.* For the same reasons, Plaintiff's request to run all search terms over custodians in excess of the original 38 should be denied.

Plaintiff also seeks to extend the October 6 deadline because he "may need to ask the Court to approve alternative service for Mr. Eck and perhaps other witnesses." Plaintiff noticed Mr. Eck for deposition on June 10, 2022. Ex. E. He had more than a year to serve him and did not.

Defendants have not yet responded to Plaintiff's belated August 17 discovery requests (Ex. F), which are far reaching (rather than narrowly tailored), and no response is due until September 18. Fed. R. Civ. P. 34. Plaintiff's long delay in serving these requests, many of which were promised in July (Dkt. 141 at 2) does not justify yet another extension. Plaintiff's third-party subpoenas seek the same damages-related information and suffer from the same untimely defect. Plaintiff could have sought this information from Defendants months ago, but did not.

Plaintiff suggested he would seek more time during the August 9 Court conference. Aug. 9 Tr. at 49:7-13. The Court responded unequivocally: "Don't expect more time." *Id.* at 50:16. But even before filing their September 5 letter, Plaintiff's counsel unilaterally decided to disregard the October 6 deadline. *See* Ex. G (offering a deposition date the week of October 11 for a witness represented by his counsel and served in March). Plaintiff has not demonstrated "good cause" to jettison the schedule. *See* Fed. R. Civ. P. 16(b)(4); *see also* *Coene v. 3M Co.*, 303 F.R.D. 32, 49 (W.D.N.Y. 2014) (noting that Plaintiff had not shown good cause for his failure to complete discovery by the scheduling order deadline). His request should be denied.

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Respectfully submitted,

*/s/ Stuart W. Yothers*

Stuart W. Yothers

cc: All counsel of record (via CM/ECF)